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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

PRUDENCE-BONDS CORPORATION (NEW CORPORATION), Successor Trustee of Prudence-Bonds Corporation, Debtor, George E. Eddy and Ada S. Beardsley,

Petitioners,

vs.

STATE STREET TRUST COMPANY, as Trustee of Prudence-Bonds, Tenth Series, under Trust Agreement dated May 1, 1927, with Prudence-Bonds Corporation,

Respondent.

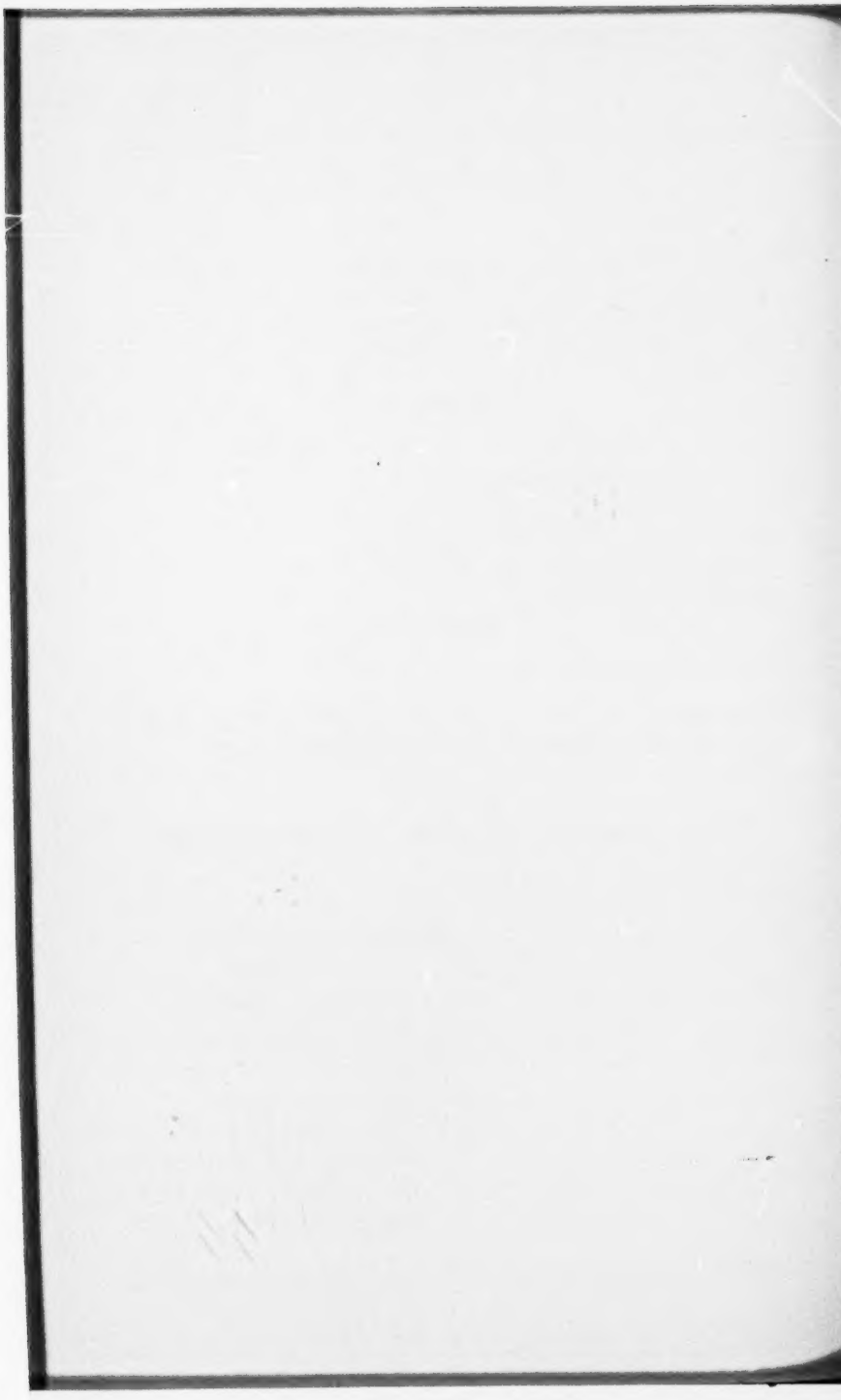
No. 211

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATE STREET TRUST COMPANY, as Trustee of Prudence-Bonds, Tenth Series, under Trust Agreement dated May 1, 1927, with Prudence-Bonds Corporation,

Respondent.

No. 211

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 461) is reported at 101 F. Supp. 729. The opinion of the Court of Appeals on the appeal (R. 1112) is reported at 202 F. 2d 555. The opinion of the same Court on rehearing (R. 1197) is reported at 202 F. 2d 558.

Jurisdiction

The judgment of the Court of Appeals (R. 1237) was entered on March 3, 1953. The petition for writ of cer-

tiorari was filed on July 28, 1953, the time having been extended by order of Mr. Justice Burton.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Petitioners also claim jurisdiction under 11 U. S. C. § 47(c).

Statement

The decision below, made on a trustee's accounting, turned on construction of a particular trust indenture. On the basis of its construction the Court of Appeals held that the respondent trustee had breached no duty to the bondholders.

The trust indenture was entered into as of May 1, 1927, between Prudence Bonds Corporation (herein called "the Debtor") and respondent State Street Trust Company, as Trustee, to secure an issue of Prudence Bonds (R. 726-769). The indenture was first submitted in draft form to respondent for approval (R. 1070), and after execution by the Debtor (R. 1070) was executed by respondent on counsel's opinion that the indenture was "in sufficiently satisfactory form for you to accept" (R. 769, 778).

The indenture provided for two separate guaranties of The Prudence Company, Inc. (herein called "the Guarantor"). The primary one was a guaranty of the bonds themselves, which was attached to the indenture (R. 770-6) and endorsed upon each bond (R. 741-2). The other, which is here involved, was a guaranty of mortgage collateral (R. 776). This guaranty was referred to by the Court of Appeals as "the Secondary Guaranty" (R. 1199), and the Guarantor itself pointed out that "As this guarantee coincides with the guarantee that appears on the bonds, it seems superfluous" (R. 1082).

Respondent accepted the trust, as the indenture provided in Article V, Section 1, "upon the distinct understanding and agreement", among other things, that it should not "take any action in respect to any default or 'event of default' unless requested to take action in respect thereto by a writing signed by the holders of not less than

twenty-five per centum in principal amount" of the outstanding bonds. Such provision was "intended only for the protection of the Trustee" (R. 758). This prohibition was complemented by other clauses limiting respondent's duties, among which were Article I, Section 5, which provided in part that the Debtor or Guarantor should collect and retain all interest and principal on the collateral, subject to Article III, Section 1(i), and that respondent should enforce any agreements contained in the collateral, upon written request and indemnification, in the manner directed by the Debtor (R. 734).*

These and the other provisions of the indenture were brought to the attention of and made binding on the bondholders. Each bond stated on its face that it was issued under and secured by the indenture, referred to the indenture for a description of "the rights and remedies of the Trustee and the respective holders of said Prudence-Bonds" and "the terms and conditions under which said bonds are secured, issued and guaranteed", and provided that "the holder hereof is bound thereby." (R. 739). The primary guaranty endorsed on each bond provided that by acceptance of the bond the holder agreed to all provisions and conditions of the indenture, "including those limiting the exercise by the Trustee of rights and remedies thereunder upon default." (R. 723, 741-2).

One of the mortgages, known as the Guyon mortgage, fell into default in principal and later in interest (R. 465). While the Guarantor breached the Secondary Guaranty in connection with the Guyon default (R. 1206), both principal

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* Article III, Section 1(i), providing for collection, reports and for payments equivalent to principal collections, expressly absolved respondent of any duty to see to the receipt of such reports or to take any action with respect thereto (R. 750). Among other provisions of the indenture similarly limiting the duties of respondent were Article I, Section 3(b); Article I, Section 6; Article I, Section 7; and Article V, Section 4 (R. 733-7, 763). The last paragraph of Article IV, Section 1, forbade respondent to interfere with any rights of the Debtor or Guarantor or to exercise any remedies for defaults until the Guarantor had failed to meet its primary guaranty of the bonds (R. 752).

and interest of the bonds themselves continued to be paid either by the Debtor or the Guarantor for several more years (R. 322, 11, 472). Respondent concededly took no action against the Guarantor for such breach of the Secondary Guaranty (R. 110, 356, 472).

No bondholder ever requested respondent to take any action with respect to such default on the Secondary Guaranty (R. 141-2, 382). Respondent did not know the names and addresses of the bondholders since the bonds were largely in bearer form and it was not paying agent therefor (R. 145-7, 324, 472).

During the depression both the Debtor and the Guarantor went into reorganization (R. 322-3, 472). In the course of the Debtor's reorganization proceedings the Court directed respondent to account (R. 28). Respondent filed its account verified August 30, 1938 (R. 43-78), and its petition for discharge verified September 1, 1938 (R. 39-42).

Petitioners filed three objections to the account (R. 85-93). The first two charged dissipations of collateral. The third alleged failure to enforce the Secondary Guaranty. The District Court referred the issues to a Special Master to hear and report (R. 93, 278).

Proceedings Before the Special Master

The Special Master received documentary evidence and heard testimony on all issues raised by the objections (R. 94), and when further issues were raised the hearings were reopened and further evidence admitted (R. 151). Not only the jurisdictional issue but the merits as well were fully tried and argued. The record was complete, and contained facts largely undisputed.

The briefs of both sides argued the effect of various provisions of the indenture, including Article V, Section 1.*

The Special Master's report (R. 278-391) recommended dismissal of the first objection and a surcharge of some

* The effect of this provision was argued at p. 18 of respondent's brief and at pp. 37-40 of petitioners' brief.

$22,375 on the second objection (R. 388). The report rejected respondent's argument that the District Court lacked jurisdiction of the third objection and recommended that respondent be surcharged thereon (R. 309, 388).

Decision of the District Court

In the District Court the briefs of both sides again argued the applicability of Article V, Section 1, among other indenture provisions.*

The District Court adopted many of the Special Master's findings and conclusions, rejected others, and omitted to pass on the remainder as being unnecessary to its decision. In addition, it made independent findings and conclusions on all three objections (R. 11-13, 472-4). Among the findings of the Special Master adopted by the District Court were findings that respondent made no profits or gains from any of its acts or omissions complained of, and that it "acted in entire good faith in the performance of its duties" under the indenture (R. 388, 472, 11).

The District Court dismissed the first objection on the merits, as recommended by the Special Master. It disagreed with the Special Master's recommendation on the second objection and reduced the surcharge thereon to some $16,625 (R. 14, 463). As to the third objection the Court held that it lacked jurisdiction, on the ground that the objection sought damages personal to the bondholders rather than restoration of trust assets, and therefore dismissed (R. 13-14, 467-71). The Court noted that various defenses of respondent, including those based on indenture provisions, might be further obstacles to a surcharge on the third objection but found it unnecessary to discuss them in view of its determination that jurisdiction was lacking (R. 471).

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* Respondent argued the point at pp. 24-26 of its memorandum and petitioners did so at pp. 14-16 of their reply memorandum.

Decisions of the Court of Appeals

Petitioners' appeal to the Court of Appeals was based on the full record containing all testimony and exhibits, including the indenture. Petitioners urged reversal of the District Court's decree on all three objections, advancing their interpretation of indenture provisions as ground for reversing on the first objection.

As to the third objection petitioners' brief contended that the District Court had jurisdiction and also argued at length that Article V, Section 1, and Article I, Section 5, did not relieve respondent of a duty to enforce the Secondary Guaranty (Br. pp. 23-8), and that "Neither these sections, nor any other provision, exempts it from such duty." (Br. p. 24). They urged the Court to reverse and to surcharge respondent on the merits (Br. p. 50). This is conceded by the petition herein (p. 8).

Respondent's brief, in addition to arguing the jurisdictional question, contended that respondent was inhibited by various indenture provisions from enforcing the Secondary Guaranty (Br. pp. 26-33).*

Petitioners' reply brief asked the Court of Appeals to reverse on the merits, and not to remand to the District Court since the facts were disclosed by documentary evidence. They said (Reply br. pp. 14-15):

> "The facts are not complicated, nor are they disputed; the evidence is all documentary and it is all in the record on appeal. This is an equity proceeding and this Court undoubtedly has the power to pass upon the whole case and grant the judgment which the Court below ought to have granted. Except on appeals involving judgments rendered on jury verdicts this Court has jurisdiction to 'review, affirm, revise or reverse,

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* The arguments which respondent did not detail, on the ground that they involved consideration of "complicated facts upon which the District Court declined to pass" (*cf.* petition herein, p. 8), were addressed to defenses other than those based upon indenture provisions (Br. pp. 35-6).

both in matters of law and in matters of fact' (Bankruptcy Act, Sec. 24, 11 U. S. C. Sec. 47). In an equity case there 'can be no question,' as stated in *Thornton* v. *Carter,* 109 F. 2d 316, 319, 'of the right of an appellate court of the United States, when it reverses a case, to direct the entry of a proper judgment or decree in the lower court and thus terminate the litigation on the merits.' (See also, *Herzberg's Inc.* v. *Ocean Acc. & Guarantee Corp.,* 132 F. 2d 438, 441). The Bank, in effect, has had two trials before the Master, and no useful purpose would be served by sending parts of the case back to the District Court to interpret some of the Master's rulings on questions of law or as to facts disclosed by documentary evidence."

The Court of Appeals affirmed the District Court's decree, upholding dismissal of the third objection on the ground, based on New York decisions, that the District Court lacked jurisdiction (R. 1112-6).

Petitioners then applied for rehearing as to the third objection, on the ground that the Court had erroneously applied New York law in determining lack of jurisdiction. The petition requested rehearing "To the end, therefore, that this case may be concluded on the merits * * *" (R. 1126).

Having entertained the petition and received briefs and argument, the Court of Appeals, per L. Hand, J., held that the District Court did have jurisdiction of the third objection and then held, on the basis of the documentary evidence in the record, that indenture provisions by which the bondholders were bound provided a complete defense to respondent. The principal provision relied on was the duty-limiting clause of Article V, Section 1, quoted hereafter (pp. 16-17) (R. 758). The Court held that by virtue of such provision, when read in the context of other duty-limiting provisions of the indenture, respondent had no duty to take action on the Secondary Guaranty except upon receipt of the prescribed written demand, and that the absence of such demand was a complete defense (R. 1204-10).

Petitioners then applied for a second rehearing, arguing that the Court of Appeals had erroneously construed the indenture, and that the provisions as so construed were void (R. 1242). There was no contention that the Court should not have passed on the indenture provisions in the absence of a construction thereof by the District Court. It was instead contended that "The finality of this Court's decisions", among other things, warranted "reversal of the majority decision, and acceptance of the dissent as the rule of this Court" (R. 1263-4). The second petition for rehearing was denied (R. 1266).

ARGUMENT

I

There is no question for this Court as to the propriety of the Court of Appeals' affirmance on a matter of law, the record being complete and the facts undisputed.

The judgment of the District Court dismissed the third objection for lack of jurisdiction, a matter of law. The Court of Appeals, having held that there was jurisdiction, affirmed the judgment on another matter of law, the indenture provisions, which the District Court had mentioned but found it unnecessary to discuss. The contention that the Court of Appeals, in so doing, probably exceeded its powers and conflicted with the Bankruptcy Act and with other decisions of Courts of Appeals, is wholly contrived and insubstantial.

The section of the Bankruptcy Act invoked, 11 U. S. C. § 47(a), is not a limitation but a broad grant of power. The statute does not preclude a Court of Appeals from disposing of an appeal on a legal ground not determined by the Court below. The statute permits a Court of Appeals to "review", "affirm", and "revise" "in matters of law", and the disposition here made by the Court was precisely that. To the undisputed facts in the record the Court applied the provisions of the indenture. Its determination

was purely one of law. The dissenting opinion agreed with the opinion of the Court that, having determined there was jurisdiction, the Court should dispose of the case on the merits (R. 1212).

All issues in the case were tried and retried before the Special Master. The entire record, consisting largely of documentary evidence, was before the Court of Appeals. That Court was empowered to affirm the judgment of the bankruptcy court on any ground supported by the record. In *In re Gustav Schaefer Co.*, 103 F. 2d 237, 242 (6th Cir. 1939), *cert. den.*, 308 U. S. 579 (1939), the Court said:

> "Upon an appeal in equity or bankruptcy, the appellate court will dispose of the case if the entire record is before it. [Citations] The record here is complete and we may make final disposition rather than remand for further hearing."

Courts of Appeals have power to affirm not only on a ground which was raised and rejected in the bankruptcy court, but also on a ground not raised at all in the bankruptcy court, and even on a ground not raised either in the bankruptcy court or in the Court of Appeals. *Dean* v. *Davis*, 212 Fed. 88 (4th Cir. 1914), *aff'd*, 242 U. S. 438 (1917); *In re Schwartz*, 89 F. 2d 172, 173 (2d Cir. 1937); *Park Lane Dresses* v. *Houghton & Dutton Co.*, 54 F. 2d 33 (1st Cir. 1931); *Knotts* v. *First Carolinas Joint Stock Land Bank*, 86 F. 2d 551 (4th Cir. 1936), *cert. den.*, 300 U. S. 660 (1937). These authorities merely apply to bankruptcy appeals the general principle that a judgment below based upon an insufficient ground will be affirmed upon any sufficient ground supported by the record, regardless whether that ground was passed upon or even raised in the lower court.*

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* Lanova Corp. *v.* National Supply Co., 116 F. 2d 235 (3d Cir. 1940); Kam Koon Wan *v.* E. E. Black, Limited, 188 F. 2d 558, 563 (9th Cir. 1951), *cert. den.*, 342 U. S. 826 (1951); Barie *v.* Superior Tanning Co., 182 F. 2d 724, 728 (7th Cir. 1950). See Helvering *v.* Gowran, 302 U. S. 238, 245 (1937); Securities Commission *v.* Chenery Corp., 318 U. S. 80, 88 (1943).

This principle of appellate review is particularly applicable where, as here, the interpretation of a written instrument is involved. See *Bull* v. *Sun Life Assurance Co.*, 141 F. 2d 456, 457 (7th Cir. 1944), *cert. den.*, 323 U. S. 723 (1944); *State Mutual Life Assur. Co.* v. *Fleischer*, 186 F. 2d 358, 364 (8th Cir. 1951). No possible purpose would have been served by remanding for an interpretation by the District Court, which was in no better position to interpret the instrument than was the Court of Appeals. *Flannery Bolt Co.* v. *Flannery*, 86 F. 2d 43, 44 (3d Cir. 1936), *cert. den.*, 309 U. S. 671 (1940). See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 182 (1918); *Frieze* v. *West American Ins. Co.*, 190 F. 2d 381, 382 (8th Cir. 1951). As the Court said in *White* v. *Higgins*, 116 F. 2d 312, 321 (1st Cir. 1940):

> "In the present cases the District Court has made no finding either way on the issue whether the grantors remained owners of the corpus of the respective estates, because the court did not think Section 213 could be considered. But on the record before us, it would not be appropriate to remand the cases for further findings of fact. The underlying facts have been stipulated, and there seems to be nothing outside the terms of the trust instruments bearing on the 'basic issue.' The District Court is in no better position than we are to draw the ultimate conclusion. An examination of the trust instruments, in the light of the Clifford case and its rationale, leads us to the conclusion that as a matter of law the income of the trusts is taxable to the respective grantors. * * *"

No different rule exists where the judgment of the bankruptcy court rests upon lack of jurisdiction rather than upon the merits. On appeal from such a judgment, if the Court of Appeals holds that there is jurisdiction it may properly refuse to remand and may dispose of the case on the merits if the record is sufficient. *Slocum* v. *Edwards*, 168 F. 2d 627, 632 (2d Cir. 1948).* The principle is the same

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* The converse is also true, and a Court of Appeals may affirm on jurisdictional grounds a judgment based below on the merits. Montgomery *v.* Gilbert, 77 F. 2d 39, 45 (9th Cir. 1935).

whether the Court of Appeals reverses, as in the *Slocum* case, or affirms, as in the case at bar.

It is only where the record is insufficient to permit termination of the litigation that Courts of Appeals refuse to determine questions not passed on below and remand to remedy the defect. The cases cited by petitioners at page 13 and at footnote 3, page 14 (only a few of which involved bankruptcy appeals), are cases of this type and therefore not pertinent here.*

Petitioners concede (p. 14) that "except on appeals involving jury verdicts, a Court of Appeals is empowered, when it reverses a cause, to direct the entry of a proper judgment in the lower court and thus terminate the litigation upon the merits." If a Court of Appeals may do this when it reverses, there is no reason why it cannot do the same thing when it affirms. It is also purely a matter of form rather than substance whether the Court of Appeals terminates the litigation by directing entry of a proper judgment in the lower court or by entering that judgment itself.

Moreover, petitioners' present position is squarely opposed to their position in the Court of Appeals, where they urged that Court to determine the merits and not to remand to the District Court (see p. 6 *supra*). Even if there were error below, a party "will not ordinarily be permitted to complain of an error which he himself invited or which at his instance the court committed." *Orenstein* v. *United States*, 191 F. 2d 184, 193 (1st Cir. 1951); *In re Park Beach Hotel Bldg. Corporation*, 96 F. 2d 886, 892 (7th Cir. 1938), *cert. den.*, 305 U. S. 638 (1938). See *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221 (1891).

While petitioners now urge that the Court of Appeals erred in disposing of the case on the merits, as they asked it to do, they also argue that the Court of Appeals erred in not reversing on the merits and holding respondent liable

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* In McDonald *v.* Smalley, 1 Pet. 620 (1828) the record, contrary to petitioners' statement (p. 13), was limited to the jurisdictional issues, and the quotation is not taken from the opinion of the Court.

(specification of error No. 9, p. 12). They further ask for "a review upon the merits by this Court." (p. 20). If petitioners were ever entitled to a remand, they have now abandoned any claim to it. Petitioners' only quarrel with the Court of Appeals is not that it decided the merits, but that it did not decide in their favor.

II

The decision below imposed no limitation on bankruptcy jurisdiction, and the asserted conflict does not exist.

The contention that the decision of the Court of Appeals "has placed an untenable limitation upon the jurisdiction of courts of bankruptcy" raises, upon this record, an abstract and fanciful question. The Court of Appeals decided that it did have jurisdiction. That decision was in petitioners' favor and is not challenged by them. Their only complaint is as to the reasoning which led to that decision, and all they seek is a correction of that reasoning.

Such an objective is not a ground for review by an appellate court. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." See *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937). As was said in *Gideon* v. *Hinds,* 238 Fed. 140, 141 (2d Cir. 1916), "An appeal brings up the ultimate question whether the decision appealed from was right or wrong; and if the result was right it is a matter of no moment that the reasons assigned for judgment may have been erroneously stated." See *Riley Co.* v. *Commissioner,* 311 U. S. 55, 59 (1940); *Kam Koon Wan* v. *E. E. Black, Limited,* 188 F. 2d 558, 563 (7th Cir. 1951), *cert. den.,* 342 U. S. 826 (1951).

Petitioners have no standing to seek review of the decision that there was jurisdiction, or of the reasoning by which that decision was reached, for they were harmed

by neither. As the Court said in *In re Schwartz*, 89 F. 2d 172, 173 (2d Cir. 1937):

> "It is obvious that an objecting creditor cannot be aggrieved by an order which denies the bankrupt his discharge. Denial of the discharge gives the full measure of relief sought by the creditor; and he has obtained it whether the judge rests his decision on one ground or another. * * * It is the correctness of the judgment, not the legal reasoning by which it was reached, that an appeal challenges * * *. A successful litigant is not injured, and may not appeal, merely because a court has rejected or failed to adopt some of his contentions."

Manifestly petitioners are not harmed by a decision as to jurisdiction in their favor, whatever the basis. See *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176 (1934); *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 (1934); *Aberly* v. *Craven County*, 70 F. 2d 52, 54 (4th Cir. 1934).

Like the decisions in the other cases cited by petitioners, the decision below held that there was jurisdiction on the facts involved. Thus, all the decisions are harmonious, and the asserted conflict is non-existent. For the same reason there can be no conflict between the decision below and the cited provisions of the Bankruptcy Act. Assuming those provisions were at all applicable, none of them is flouted by the decision of the Court of Appeals that it had jurisdiction.

The claimed qualification in the Court of Appeals' determination of jurisdiction could not be a conflicting decision since it was merely reasoning and not a decision at all. Any implication as to a possible limitation on jurisdiction was, as this Court stated in *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 5 (1917), at most "only reasoning deemed by the court to throw light upon its conclusion on the subject which was before it * * * and as a prelude to the ground upon which the judgment rendered was rested * * *". Moreover, the supposed jurisdictional limitation

was not made. The Court expressly declined to decide whether jurisdiction depended upon non-transfer of the bonds, saying (R. 1202), "We do not find it necessary to decide what was the effect of a transfer of any of the bonds in New York * * *".

III

The decision below raises no question of federal law and conflicts with no decision of this Court.

The argument that the Court of Appeals wrongly decided a question of federal law is based on the premise that its decision limited the jurisdiction of the bankruptcy court. The falsity of that premise and petitioners' lack of standing to urge it have been shown above (pp. 12-14). The utter lack of substance in the effort to portray the discussion by the Court of Appeals as an important decision requiring review by this Court is emphasized by petitioners' complaint that the Court below "apparently believed it was controlled by, New York law under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64." They seek certiorari to correct this "apparent belief", which they attempt to elevate to the status of a decision. Yet petitioners concede (pet. p. 10) that the Court of Appeals made its decision "upon certain assumptions" "avoiding any decision as to what law governed the issue of jurisdiction".

Even if the "apparent belief" that New York law controlled had been the actual decision, there is no basis for the intimation that it was induced through a misapprehension as to the *Erie* case, which was not even mentioned. The applicability of state law to a question respecting which the Bankruptcy Act did not "otherwise require or provide," rested, on well-established principles, on the Rules of Decision Act (28 U. S. C. § 1652).

This accounting, although held in the bankruptcy court, was not "a bankruptcy cause" or "a summary proceeding" in bankruptcy. It was held in the bankruptcy court as a matter of convenience, not because of any require-

ment of the Bankruptcy Act, and could equally well have been brought in another forum. *Central Hanover B. & T. Co.* v. *President, etc. of M. Co.*, 105 F. 2d 130, 132 (2d Cir. 1939).

The Debtor's reorganization made the federal court available as a forum, but federal law did not otherwise contribute to the case. *Williams* v. *Austrian*, 331 U. S. 642, 658 (1947); *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 598, 599 (1949). The duties of respondent and the rights of the bondholders were created by state law.* The Bankruptcy Act prescribed no standards for fixing the nature or extent of the liabilities of an indenture trustee. The choice of a federal tribunal did not alter the nature of the rights to be enforced therein, and those rights were properly determined by state law.**

* * * *

The second and third reasons urged by petitioners ignore the holding of the Court, in petitioners' favor, that there was jurisdiction and complain that the opinion suggested an unsound limitation on jurisdiction which is a matter of substantial importance and should be reviewed by this Court. If, however, after the Court had decided the

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* This was so before as well as after Erie R. Co. *v.* Tompkins, *supra.* Corn Exchange Bank *v.* Klauder, 318 U. S. 434, 436-7 (1943) and footnote 8; Thompson *v.* Magnolia Co., 309 U. S. 478, 483-4 (1940). In re V-I-D, Inc., 198 F. 2d 392 (7th Cir. 1952), *cert. den.*, 344 U. S. 914 (1953), and the cases cited by petitioners at page 19, footnote 9, were cases governed by express provisions of the Bankruptcy Act; they therefore have no bearing on the situation here presented. The former case and Prudence Realization Corporation *v.* Geist, 316 U. S. 89 (1942), and Vanston Committee *v.* Green, 329 U. S. 156 (1946), all involved the allowance of claims, a subject clearly controlled by the Bankruptcy Act. Wragg *v.* Federal Land Bank of New Orleans, 317 U. S. 325 (1943), Wright *v.* Union Central Ins. Co., 304 U. S. 502 (1938) and Board of Trade of City of Chicago *v.* Weston, 243 Fed. 332 (7th Cir. 1917), dealt with jurisdiction over property of a debtor in situations where the Bankruptcy Act had specific provisions on the subject. Holmberg *v.* Armbrecht, 327 U. S. 392 (1946), dealt with a federal-created right and had nothing to do with bankruptcy.

** It was immaterial whether the law of Massachusetts or of New York applied. The law of both jurisdictions is the same. See respondent's brief on rehearing (R. 1159-65).

jurisdictional question in petitioners' favor, it had also decided for them on the merits of the case—as they strongly urged it to do—the alleged question of substantial importance would be exactly the same with exactly the same need for answer. Yet under such circumstances it could hardly be imagined that this petition would have been filed for the purpose of raising that question.

IV

The decision of the Court of Appeals was neither of public importance nor untenable.

This is a private controversy, of concern only to the private litigants. The decision of the Court of Appeals turned on construction of a particular trust indenture, a question which petitioners concede does "not ordinarily merit review by this Court." That there may be a large number of bonds outstanding under other indentures does not change this case to one of public importance. The Court's decision establishes no precedent of general application, and courts will continue to solve questions of construction on the basis of the particular language in a particular instrument.

The complaint that the Court of Appeals laid down "two untenable rules governing trust indentures" is unfounded.

The first alleged error is that the Court ruled that exculpatory clauses must be construed by resolving ambiguities in favor of the trustee draftsman. But the Court in fact made no such "ruling", and, as already pointed out, (p. 2) respondent was not the draftsman. In construing the indenture the Court carefully analyzed Article I, Section 5, and Article III, Section 1(i), which limited the duties of respondent, and rested its decision principally on the related provisions of Article V, Section 1, which provided, in pertinent part:

> "* * * nor shall the Trustee take any action in respect to any default or 'event of default' unless re-

> quested to take action in respect thereto by a writing signed by the holders of not less than twenty-five per centum in principal amount of the Prudence-Bonds issued hereunder and then outstanding * * *." (R. 75t)

In construing these provisions as applicable to the Secondary Guaranty the Court found no reason "which compels us deliberately to defeat what would be the unavoidable construction of the words in any other document" (R. 1207-8), and concluded that there was not "any doubt in our minds that the parties meant to give complete immunity to the Trustee for any nonfeasance in suing either the mortgagors or the Guarantor." (R. 1210). In thus grounding its decision on an examination of all related provisions of the indenture the Court followed long-established principles of construction.*

Petitioners' second contention, that the Court of Appeals should have held the duty-limiting provisions of the indenture invalid as against public policy, is equally groundless. None of the complementary provisions upon which the Court relied granted respondent blanket immunity against any liability for nonfeasance. Those provisions were not exculpatory clauses relieving respondent of liability for inaction; they negatived any duty to act, and Article V, Section 1 in fact prohibited action in the premises.**

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* Miller *v.* Robertson, 266 U. S. 243, 251 (1924); United States *v.* Stage Company, 199 U. S. 414, 423 (1905); O'Brien *v.* Miller, 168 U. S. 287, 297 (1897); Eustace *v.* Dickey, 240 Mass. 55, 72-3, 132 N. E. 852 (1921). The Court in pressing "with unusual persistence the doubts that cannot but inhere" in the process of construction and in being "satisfied with no extension of the literal meaning unless it satisfies every logical compunction" (R. 1210) gave ample scope to the doctrine of strict construction, which is applicable only where ambiguities may not be otherwise resolved. Tischendorf *v.* Lynn Mutual Fire Ins. Co., 190 Wis. 33, 208 N. W. 917 (1926). The cases cited by petitioners at footnote 11 on page 21, where stating the rule, make clear that it is confined to cases where ambiguities exist. The rule is "to be resorted to only when all other rules of construction fail." Taber *v.* Beaudette & Graham Co., 262 Mass. 99, 103, 159 N. E. 505 (1928).

**In none of the cases cited by petitioners was a duty-limiting clause, such as the one here involved, held to violate public policy.

The public policy of both Massachusetts and New York upholds the validity of such duty-limiting provisions. In *Partridge* v. *American Trust Co.*, 211 Mass. 194, 197, 97 N. E. 925 (1912), the Supreme Judicial Court of Massachusetts said:

> "By the fourth article the trustee was not required except upon default by the debenture company, and then only upon request in writing 'of the holder or holders of a majority of the debentures in default,' to record at once, 'all unrecorded assignments to it of mortgages held by it under the provisions thereof,' * * *. Viewed in the light of what has happened it may be that the rights of the bondholders were insufficiently protected, but until they have complied with the terms of this article, and the trustee has neglected or refused to perform, neither defendant can be charged with unfaithful administration, or compelled to account generally."

See also *Estabrook* v. *International Trust Co.*, 227 Mass. 281, 116 N. E. 486 (1917). And in *Benton* v. *Safe Deposit Bank*, 255 N. Y. 260, 265, 174 N. E. 648 (1931)* the New York Court of Appeals said:

> "The duty of the trustee is measured and limited by its agreement. This * * * stated that the trustee was under no duty to record the instrument. Such agreements are legal and binding, unless they are contrary to some statute or against the public policy of the State. We can see no reason why such an agreement is not binding upon the mortgagor and the trustee, and those who have purchased the notes with notice of the mortgage and opportunity to fully examine its terms and conditions."

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*In the Benton case, the court purported to apply the law of Pennsylvania, but intimated that New York law did not differ. It does not differ. Green *v.* Title Guarantee & Trust Co., 223 App. Div. 12, 15 (1st Dep't 1928), aff'd 248 N. Y. 627 (1928); Hazzard *v.* Chase National Bank, 159 Misc. 57, 80-81 (Sup. Ct. N. Y. Co. 1936), aff'd, 257 App. Div. 950 (1st Dep't 1939), aff'd, 282 N. Y. 652 (1940).

No question of "reckless indifference" or "gross negligence" arose in the foregoing cases, and any talk about that type of misconduct is likewise irrelevant in the present case. Whatever may be the rule as to clauses attempting to relieve a trustee of liability for plain breach of trust, there can be no question of "reckless indifference" or "gross negligence" where no duty exists. Even in the case of ordinary exculpatory clauses, the only limitation on the effectiveness thereof in Massachusetts is bad faith and no different rule applies to corporate trustees.* Respondent's good faith and lack of self-dealing were expressly found by the Special Master and affirmed by the District Court (R. 388, 472, 11), and any finding of recklessness or other aggravated misconduct is significantly absent.

The Court of Appeals' construction of the indenture is hardly one to call for the exercise of this Court's powers of supervision.

CONCLUSION

There were two petitions for rehearing in the Court of Appeals, its decision was thoroughly considered, and there is no more reason for review by this Court than in the countless number of other cases where one party is dissatisfied with a Court's construction of a particular instrument.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

August 28, 1953.

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*New England Trust Company *v.* Paine, 317 Mass. 542, 550-1, 59 N. E. 2d 263 (1945); North Adams National Bank *v.* Curtiss, 278 Mass. 471, 476-8, 180 N. E. 217 (1932).